

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT LOUIS JOHNSON,

Defendant-Appellant.

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UNPUBLISHED

January 25, 2007

No. 263320

Ottawa Circuit Court

LC No. 04-028217-FC

Before: Sawyer, P.J., and Neff and White, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree criminal sexual conduct, MCL 750.520b(1)(f). Defendant was sentenced as an habitual offender, third offense, MCL 769.11, to 8 to 20 years' imprisonment. He appeals as of right. We affirm.

I

Late in the evening, on April 12, 2004, defendant and the victim, along with others, including August Cole-Ruth, Jamie Haverhals, Darcy Blackmon, and Heather Blackmon, attended a party at a Holland apartment rented by the mother of Jimmy Rice. According to the victim, when other guests started to leave the party sometime after midnight, she went to use the bathroom. While she was sitting on the toilet, defendant walked into the bathroom and locked the door. The victim asked him to leave. Instead of leaving, defendant turned the bathroom lights off and pinned the victim against the wall. After removing one of the victim's pant legs, defendant penetrated her vagina with his penis. The victim told defendant "no" and "to stop" three or four times.

II

Defendant first claims on appeal that the trial court erred in allowing the prosecution to impeach his testimony with evidence of his prior conviction of first-degree retail fraud under MRE 609. We review a trial court's decision to allow impeachment by evidence of a prior conviction for an abuse of discretion. *People v Coleman*, 210 Mich App 1, 6; 532 NW2d 885 (1995). "An abuse of discretion occurs 'when the result is "so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but [the] defiance [of it] . . . .'" *People v Meshell*, 265 Mich App 616, 634; 696 NW2d 754 (2005) (citations omitted).

Defendant was convicted of first-degree retail fraud, MCL 750.356c(1), in 1994.<sup>1</sup> The crime of first-degree retail fraud contains an element of theft<sup>2</sup> and is, therefore, an indicator that defendant is of a dishonest character and may not testify truthfully. See *People v Cross*, 202 Mich App 138, 147; 508 NW2d 144 (1993). Pursuant to MRE 609(a)(2), evidence of a defendant's prior conviction that contains an element of theft may be admitted to impeach the defendant's testimony only if the probative value of the conviction outweighs its prejudicial effect. MRE 609(a)(2)(B); *Meshell, supra* at 635.

MRE 609(b) sets forth the considerations in weighing the probative value and the prejudicial effect of a prior conviction:

“Determining probative value and prejudicial effect. For purposes of the probative value determination required by subrule (a)(2)(B), the court shall consider only the age of the conviction and the degree to which a conviction of the crime is indicative of veracity. If a determination of prejudicial effect is required, the court shall consider only the conviction's similarity to the charged offense and the possible effects on the decisional process if admitting the evidence causes the defendant to elect not to testify. The court must articulate, on the record, the analysis of each factor.” [*Meshell, supra* at 635, quoting MRE 609(b).]

In applying the balancing test under MRE 609(b), the trial court observed that this case involved issues of credibility and, therefore, impeachment of defendant's testimony was important to the prosecutor, and, in the court's view, not unfairly prejudicial to the defense. The court concluded that the prior conviction was admissible for impeachment purposes, i.e., that the probative value of the conviction outweighed the prejudicial effect.

In this case, although the age of the prior conviction reduced its probative value, the extreme dissimilarity between the prior conviction and the current offense greatly reduced any prejudicial effect. *Meshell, supra* at 636. Even though defendant's testimony was important to the decisional process because this case involved a credibility contest between defendant and the victim, we cannot conclude that the court abused its discretion in admitting the prior conviction for impeachment purposes on this close evidentiary question. “A trial court's decision on a close evidentiary question generally cannot be an abuse of discretion.” *Id.* at 637.

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<sup>1</sup> Contrary to defendant's argument, we find no error with regard to the ten-year time limitation for prior convictions under MRE 609(c). Defendant does not dispute that he was sentenced on December 19, 1994, to a 60-day jail sentence with credit for 53 days served and, therefore, the ten-year requirement under MRE 609(c) was met, given that the trial in this case occurred in November 2004.

<sup>2</sup> To the extent defendant complains that the trial court referred to defendant's prior conviction as involving a crime of “dishonesty,” any erroneous reference was inconsequential because the court proceeded to apply the required balancing test for a theft crime, MRE 609(a)(2).

While the trial court did not fully articulate its analysis of the considerations under MRE 609(b), we find no error requiring reversal. A trial court's failure to articulate its analysis on the record does not require reversal if the trial court was aware of the pertinent factors and aware of its discretion. *Meshell, supra* at 638. The record indicates that the court was aware of the necessary considerations and its discretion under MRE 609.

Even if error occurred, we find no basis for reversal of defendant's conviction. A preserved, nonconstitutional error merits reversal only when, in the context of the entire trial, it affirmatively appears more probable than not that the error was outcome determinative. *People v Bauder*, 269 Mich App 174, 179-180; 712 NW2d 506 (2005).

Defendant argues that, because this was a case about credibility, the impermissible admission of his prior conviction cannot be deemed harmless. However, defendant's own testimony showed the jury that he was dishonest. Defendant testified that he did not initially tell a certain police officer that he engaged in sexual intercourse with the victim because he was embarrassed. Thus, he initially lied to the officer. In addition, there was testimony that almost a month after the party, defendant told a different officer a "new story" of what occurred in the bathroom. Additionally, defendant's testimony contradicted the testimony of all of the other witnesses who were at the party and testified at trial, thus undermining his credibility.

In arguing that defendant was not credible, the prosecution did not mention defendant's prior conviction. Rather, the prosecution emphasized the fact that defendant told three different stories to the police and that defendant's testimony was not corroborated by any other witness. To the contrary, testimony and other evidence corroborated the victim's testimony that the intercourse was not consensual. Under these circumstances, we find any error harmless. *Id.* at 180.

### III

Defendant also claims on appeal that the prosecution committed misconduct by violating its duty to produce endorsed witnesses Darcy Blackmon, Heather Blackmon, and Jimmy Rice. Defendant further argues that because the witnesses were not produced for trial, the trial court erred in failing to give a "missing witness" instruction to the jury. In the alternative, defendant argues that he was denied effective assistance of counsel because counsel failed to object to the nonproduction of witnesses and counsel failed to request the missing witness instruction.

Defendant failed to raise these issues before the trial court. We review unpreserved claims of prosecutorial misconduct for plain error affecting defendant's substantial rights. *People v Goodin*, 257 Mich App 425, 431-432; 668 NW2d 392 (2003). Because defendant did not request a *Ginther*<sup>3</sup> hearing or move for a new trial, our review of defendant's claim that he was denied ineffective assistance of counsel is limited to the record on appeal. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658; 620 NW2d 19 (2000).

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<sup>3</sup> *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

Before trial, defendant moved to admit the written statements of Darcy, Heather and Rice pursuant to MRE 804(b)(7). Before hearsay evidence may be admitted under MRE 804, there must be a showing that the declarant is unavailable. MRE 804(b); *People v Welch*, 226 Mich App 461, 464 n 2; 574 NW2d 682 (1997). A declarant is unavailable if he “is absent from the hearing and the proponent of a statement has been unable to procure the declarant’s attendance . . . by process or other reasonable means, and in a criminal case, due diligence is shown.” MRE 804(a)(5). Thus, defendant’s request to admit the witnesses’ written statements necessarily required a concession that Darcy, Heather, and Rice were unavailable despite an exercise of due diligence in attempting to locate them. Accordingly, defendant may not now assert error premised on the lack of due diligence by the prosecutor. “A defendant should not be allowed to assign error on appeal to something his own counsel deemed proper at trial. To do so would allow a defendant to harbor error as an appellate parachute.” *People v Green*, 228 Mich App 684, 691; 580 NW2d 444 (1998) (citation omitted).

Because defendant conceded that the witnesses were unavailable, and that the prosecutor did not know where they were the prosecutor had no duty to produce the witnesses, and the missing witness instruction was unwarranted. *People v Eccles*, 260 Mich App 379, 388-391; 677 NW2d 76 (2004); *People v Snider*, 239 Mich App 393, 422-423; 608 NW2d 502 (2000). Defendant’s claim of error concerning due diligence fails.

Defendant’s alternative claim of ineffective assistance similarly fails. To establish a claim of ineffective assistance of counsel, a defendant must prove that his counsel’s performance was deficient and that, under an objective standard of reasonableness, he was denied his Sixth Amendment right to counsel. *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005). A defendant must overcome the strong presumption that counsel’s performance constituted sound trial strategy. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004).

Defendant asserts that no reasonable strategy could explain counsel’s failure to insist that the prosecution establish that it could not locate Darcy, Heather, and Rice despite an exercise of due diligence. We disagree. As noted above, defense counsel sought to admit the written statements of Darcy, Heather and Rice under MRE 804(b)(7), which was conditioned on the witnesses’ unavailability. Defense counsel’s failure to raise the issue of the prosecutor’s lack of due diligence in locating the witnesses may therefore have been a matter of trial strategy to support admission of the favorable written statements.

Finally, counsel was not ineffective for failing to request the missing witness instruction. As stated earlier, the missing witness instruction was unwarranted in this case, and therefore, any request for the missing witness instruction would have been futile. Counsel is not required to make a meritless motion or a futile objection. *Matuszak*, *supra* at 58; *Goodin*, *supra* at 433.

Affirmed.

/s/ David H. Sawyer  
/s/ Janet T. Neff  
/s/ Helene N. White